(1)

Supreme Court, U.S.
FILED
05-307 SEP 1 2005
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

JONATHAN PENNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN THOMAS MORAN, JR.
Counsel of Record
309 West Washington Street
Suite 900
Chicago, Illinois 60606
(312) 630-0200

Attorney for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

QUESTIONS PRESENTED

1. Whether the constitutional provision barring suspension of the writ of habeas corpus was violated by the district court's dismissal of petitioner's Section 2255 petition as "untimely" and therefore outside his jurisdiction, where petitioner presented ineffective assistance of counsel issues predicated on both an allegation of an undisclosed conflict of interest as well as the quality of the representation provided, even though factual support for the latter claim was not available to petitioner until August 30, 2004, when the U.S. Attorney provided evidence that he had supplied petitioner's trial counsel with the transcript of a deposition of a key witness whose testimony went to petitioner's guilt or innocence and was relied on for enhancing sentence.

2. Whether the failure of the district court to conduct a Federal Rule of Criminal Procedure Rule 44 or *Garcia* inquiry into the joint representation issues surrounding petitioner's trial counsel required granting of the motion to vacate his judgment and conviction for a new trial due to the violation of petitioner's right to conflict-free representation.

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vi

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 7

1. The Record Below Unequivocally Contradicts the District Court's Finding that He Did Not Have "Jurisdiction" Over Petitioner's Claims of Ineffective Assistance of Counsel. Dismissal of a Section 2255 Petition that Raises Ineffective Assistance of Counsel as "Untimely" Where Evidence of such Ineffectiveness of Counsel Is Received While the Petition Is Pending, Falls within the Exceptions to the AEDPA's Limitations Period. To Hold Otherwise Constitutes an Unconstitutional Suspension of the Writ. . . 7

2. This Court, Under Its Supervisory Powers over the Federal Courts, Should Require that the District Courts Conduct *Garcia* Inquiries into Joint Representation and Conflicts of Interest

under Federal Rule of Criminal Procedure 44, and Hold Here that the Record Requires a New Trial Because of the Lack of an Effective Waiver of Conflict-Free Counsel in Violation of the Sixth Amendment 10

Conclusion 12

TABLE OF CITED AUTHORITIES

PAGE(S)

Cases:

Apprendi v. New Jersey,
530 U.S. 466 (2000) 3

Brady v. United States,
397 U.S. 742 (1970) 10

Castillo v. United States,
531 U.S. 845 (2000) 3

Castro v. United States,
540 U.S. 375 (2003) 11

Cuyler v. Sullivan,
466 U.S. 335 (1980) 11

Glasser v. United States,
315 U.S. 60 (1942) 11

Johnson v. Zerbst,
304 U.S. 458 (1938) 10

Jones v. United States,
526 U.S. 227 (1999) 3

McCarroll v. United States,
Nos. 99 C 884, 95 CR 48-1 3

Rasul v. Bush,
542 U.S. 466 (2004) 7

Rompilla v. Beard,
125 S.Ct. 2456 (2005) 9

United States v. Fish,
34 F.3d 488 (7th Cir. 1994) 11

United States v. Garcia,
517 F.2d 272 (5th Cir. 1975) 10

United States v. Hubbard,
22 F.3d 1410 (7th Cir. 1994) 11

Statutes Cited:

21 U.S.C. § 841 (a)(1) 5

21 U.S.C. § 846 5

21 U.S.C. § 884 5

28 U.S.C. § 2253 (c) 4

28 U.S.C. § 2255 ..... 3, 4, 6, 7

United States Constitution Cited:

Article I, § 9, cl. 2 ..... 1, 7, 9

Fifth Amendment 2

Sixth Amendment 2, 7

Federal Rules of Procedure:

Fed.R.Crim.P. 11 10

Fed.R.Crim.P. 44 ..... 2, 3, 6, 8

TABLE OF APPENDICES

PAGE(S)

Order of the Seventh Circuit denying certificate of appealability decided May 3, 2005 ..... App. 1

Order of the District Court dismissing petitioner's motion for a writ of habeas corpus, entered 3/29/2005 ..... App. 2

Notice of Motion of Reconsideration, dated 11/5/2004 ..... App. 3

Motion for Reconsideration, filed 11/5/2004 ..... App. 4-10

Exhibit to Motion for Reconsideration (letter of government to petitioner's counsel) ..... App. 11-24

Order of District Court taking motion for reconsideration under advisement entered 11/18/2004 ..... App. 25-

Notice of appeal filed 11/5/2004 ..... App. 26

Order of district court denying request for certificate of appealability, entered 10/22/2004 ..... App. 27-28

Notice of Request for Certificate of Appealability dated 10/5/2004 ..... App. 29

Jonathan Penny's Request for Certificate of Appealability Pursuant to 28 U.S.C. § 2253 (c) ..... App. 30-31

Memorandum Opinion and Order dismissing Petition, filed 9/23/2004 ..... App. 32-39

Notice of Motion to Amend § 2255 Motion ... App. 40-41

Notice of Motion to Amend § 2255 Motion filed 8/8/2000 ..... App. 42-53

Motion to Vacate, Set Aside or Correction a Sentence and Supporting Memorandum of Law filed 3/22/1998 ..... App. 54-61

Petitioner Jonathan Penny respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's order denying petitioner's request for a certificate of appealability is unreported and appears at App. 1. The District Court's order denying a certificate of appealability appears at App. 27-28. The District Court's Memorandum Opinion and Order dismissing the § 2255 petition as untimely appears at App. 33-41. It may be found at 2004 U.S. Dist. LEXIS 19436 (N.D. Ill. 2004).

STATEMENT OF JURISDICTION

The judgment of the Seventh Court of Appeals was entered on May 3, 2005. App. 1. On application to a Justice of this Court, Justice Stevens, the time for filing a petition for writ of certiorari was enlarged to September 1, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES INVOLVED

This case involves a violation of Art. I, § 9, cl.2 of the Constitution, the right to due process of law and to counsel:

Article I, § 9, cl. 2 states:

> Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the United States Constitution, in pertinent part, reads:

> No person shall . . . be deprived of lief, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution, in pertinent part, read:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Rule 44 of the Federal Rules of Criminal Procedure states in pertinent part:

> Rule 44. Right to and Appointment of Counsel
>
> ((c) Inquiry Into Joint Representation.
>
> (1) Joint Representation. Joint representation occurs when:
> (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and
> (B) the defendants are represented by the same counsel, or counsel who are associated in law practice.
>
> (2) Court's Responsibilities in Cases of Joint Representation. The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no

conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

STATEMENT OF THE CASE

On March 22, 1998 Jonathan Penny filed a § 2255 petition contesting whether he received effective assistance of counsel at trial and on appeal and whether the government withheld evidence requiring a *Garcia* hearing under Fed.R.Crim.P. 44. App. 54-61. On August 8, 2000, petitioner filed a *pro se* notice of motion to amend his pending petition to include claims arising under *Jones v. United States*, 526 U.S. 227 (1999), *Castillo v. United States*, 531 U.S. 845 (2000), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On November 6, 2002, petitioner filed an Amended Memorandum in support of the pending § 2255 petition and opposing the government's contention that the petition as amended was untimely and adding authority as to areas in which trial counsel was ineffective beside the conflict of interest, including pointing out that the information which formed the operative basis of the amended petition was unavailable to petitioner until at the earliest, December of 1998 when it was discovered in another case, *McCarroll v. United States*, Nos. 99 CV 884, 95 CR 48-1. Petitioner filed his petition within one year (actually about 3 months) of obtaining the information from that case. On January 21, 2004, petitioner filed his reply to the government's response.

On April 8, 2004, the district court ordered a limited evidentiary hearing confined to the question of whether petitioner knew or should have known of the facts relating to his assertion of an undisclosed conflict of interest. The hearing took place on May 3 and May 5, 2004. At the hearing, the court conceded that it failed to follow Federal Rule of Criminal Procedure Rule 44 and did not inquire at

that time into petitioner's knowledge of the relationship between his former and present attorneys and the basis for the former's disqualification.

In response to a request by petitioner's counsel at the close of the hearing, on August 30, 2004, the government produced a letter detailing documents provided to petitioner's trial counsel, Freddrena Lyle. The letter was attached to petitioner's Motion for Reconsideration of Denial of Certificate of Appealability and Denial of Amended Petition Under 28 U.S.C. § 2255. (The Motion appears at App. 4-21 and the disclosure at App. 20 under "Enclosures".) Subsequent to the hearing, the court found that it did not have jurisdiction to consider the merits of any of petitioner's claims based solely on a determination that petitioner knew or should have known of the conflict of interest in time to file a timely § 2255 petition. App. 32-39. On October 5, 2004, petitioner moved for a certificate of appealability pursuant to 28 U.S.C. § 2253 (c). App. 29-31. On October 22, 2004, the court denied t.. request. App. 27-28. On November 5, 2004, petitioner filed a notice of appeal. App. 26. And he filed the Motion for Reconsideration noted above. The motion was denied by order dated March 29, 2005. App. 2. The Court of Appeals then "construed" the notice of appeal as an application for a certificate of appealability and denied based on a review of the "final order" of the district court. App. 1. There is no indication that the Court of Appeals reviewed the motion for reconsideration although it was attached as an exhibit to a "status report" ordered by that court which was filed on November 24, 2004. That court held that there was not a "substantial showing of the denial of a constitutional right." App.1.

However, the facts alleged were substantially affirmed by the testimony at the limited evidentiary hearing. The case against petitioner began with the filing of a civil forfeiture action. On April 4, 1989, District Judge Grady